Supreme Court, U. S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. ~~79~~ 79-1973

MOLLY MURPHY'S, INC. and
MOLLY MURPHY'S CLUB, INC.,
Petitioners,

vs.

RONALD M. MASTERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENT F. FRATES
ELLIS & FRATES
Counsel for Petitioners
Suite 1250, 101 Park Avenue Building
Oklahoma City, Oklahoma 73102
Telephone (405) 272-0616

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

MOLLY MURPHY'S, INC. and
MOLLY MURPHY'S CLUB, INC.,
Petitioners,

vs.

RONALD N. MASTERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on March 24, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, entered March 24, 1980, is unreported and is printed in the Appendix hereto, infra, p. 1. The Journal Entry of Judgment of the United States District Court for the Western District of Oklahoma, entered on May 30, 1978, is unreported and is printed in the Appendix hereto, infra p.7

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was made and entered on March 24, 1980. Timely petition for rehearing was denied on April 29, 1980. (Appendix, infra, p.10). The jurisdiction of this Court invoked under 28 U. S. C. §1254 (1).

QUESTIONS PRESENTED

In 1974, Petitioners' president and organizer, Robert L. Tayar,desired to build a unique "theme" restaurant in Oklahoma City, Oklahoma. Mr. Tayar selected a location for the venture and entered into a lease agreement with the owner of the real estate which generally obligated the owner / lessor to pay for construction of the shell of the building, with Petitioners to furnish the decor, furniture and fixtures necessary for operations.

Mr. Tayar then made contact with Respondent Masters who had designed similar restaurants. Respondent, by way of verbal and written statements represented that he was in fact a trained and licensed achitect.

On March 11, 1975, Petitioners and Respondent entered into a written contract whereby Respondent would provide all necessary design and planning services for Petitioners' restaurant and Petitioners would pay Respondent 1% of the gross revenue of the venture for ten years from the date of its opening. A contemporaneously executed flat fee agreement between the owner / lessor and the Respondent is not here at issue.

Respondent invoked district court jurisdiction pursuant to 28 U. S. C. §1332 and brought suit for recovery of the percentage fee. Petitioners defended on the basis of fraud in that Respondent falsely and maliciously represented himself as, and held forth as an architect. Respondent and Petitioners stipulated before trial that Respondent had earlier, in a related Oklahoma County , District Court case (No. CJ-76-1448), been deposed under oath and had stated that he was a licensed architect. Said statement was subsequently proved to be and

was admitted as false by Respondent. While other relief was sought by the parties as well as other defenses asserted, the other contentions are not pertinent to this petition.

The case proceeded to jury trial. The District Court then directed a verdict for Respondent against the Petitioners on the issue at hand, which directed verdict was affirmed by the Court of Appeals , with rehearing denied.

The questions presented are:

1) Whether the Petitioners offered proof of damages supportive of the defense of fraud and sufficient to create a question for the trier of fact;

2) Whether the District Court's directing a verdict denied Petitioners' right to submit their case to a jury; and

3) Whether the Court of Appeals' affirmance of the District Court and denial of rehearing was clearly erroneous and departed from the accepted and usual course of judicial proceedings.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The terms of 23 Oklahoma Statutes 1971 §3 provide:

"Any person who suffers detriment from the unlawful act or omission of another, may recover from the person at fault a compensation therefor in money, which is called damages."

The terms of 23 Oklahoma Statutes 1971 §4 provide:

"Detriment is a loss or harm suffered in person or property."

STATEMENT OF CASE

The petitoners' defense of fraud was proved in all respects and supported by ample and unrebutted evidence. The Court

of Appeals incorrectly ruled that proof as to the element of damages was lacking, a lack which was used as the sole justification for the District Court's directing a verdict against Petitioners.

It is uncontested that a person relying on the theory of fraud under Oklahoma law, must offer evidence of the following elements:

1) a representation was made as a statement of fact;

2) the representation was untrue and known to be untrue by the party making it or recklessly made when the person making it should reasonably know that it was untrue;

3) the representation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and

4) the other party did in fact rely on it and was induced thereby to act to his damage.

The District and Appeals Courts in this case determined that a lack of evidence existed as to the above cited element of damages Petitioners assert that damage proof was certainly sufficient to present a jury question. Testimony at trial by Petitioners' witness, Robert L. Tayar, clearly established damages flowing from Respondent's fraud:

"Q: Did he (Masters) give you any estimated cost of the project?

A: Yes, he did.

Q: Can you remember what those costs were?

A: Yes. He agreed that the building to Mr. Scott could be put up for the 350,000 or less and on my part he said he would take around $100,000.00 for the interior.

Q: Does that include the equipment and the interior decoration?

A: Yes.

Q: Did Mr. Tayar, did his -- was the cost estimates accurate?

A: Not by any stretch of the imagination.

Q: How much --

A: My beginning note at the bank when I first started paying on it was $480,000.00.

Q: You spent $480,000.00 on the project?

A: Part of that was a transfer. I spent 420 because part of it was a transfer of $60,000.00 on another project.

Q: You spent $420, 000.00 on this project?

A: Yes.

Q: And it was -- the original estimate was that you would spend $100,000.00?

A: Yes.

(Trial transcript, p. 241,1.11 - p. 242, 1.8)

The $320,000.00 cost overrun stood unrebutted by the Respondent and represented Petitioners' damages or detriment as defined by Oklahoma Statutes 1971 §§3 & 4.

Further there was evidence that Petitioners, in ultimately selecting Respondent, bypassed another non-architect designer who had quoted a $20,000.00 flat fee. (Trial transcript, p. 242). In accepting Respondent's higher bid, Petitioners agreed to pay a percentage fee in addition to the fixed fee paid by the owner / leaser thereby placing a premium upon Respondent's alleged qualifications and training. The percentage fee may amount to a sum of as much as $200,000.00 over its term of payment, obviously a high cost for Respondent's bogus architectural services. The difference between the amount expended plus projected percentage expenditure and the $20,000.00 quotation by the designer represented yet another facet of Petitioners' damages.

REASONS FOR GRANTING THE WRIT

The decision below should be reversed because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the lower court as to call for an excercise of the Supreme Courts' power of supervision.

ARGUMENT

Question 1. The Petitoners offered proof of damages supportive of their defense of fraud and sufficient to create a question for the trier of fact. A cost overrun of $320,000.00 is well within the Oklahoma statutory definition of damages and detriment, as is the increased fee based on Respondent's falsely represented architectural qualifications.

A decision as to whether the Petitioners were damaged was a fact question and should have been submitted to the trier of fact. The District Court's deviation in this regard, improperly foreclosing jury consideration of the proof as to damages, with the Court of Appeal's sanction of said deviation, calls for this Court's intercedence and supervision.

Question 2. The District Court's directing a verdict denied Petitioners' right of submission of the case to a jury. It is a paramount rule that the jury act as sole judge of weight and credibility of testimony. Most strenuous is the standard which measures a directed verdict's propriety.

Evidence must be viewed most favorably to the party against whom the motion is made. *Wilkin v. Sunbeam Corporation*,377 F.2d 344 (10th Cir. 1967), cert. denied, 389 U. S. 973, 88 S. Ct. 472, 19 L.Ed2d 464 (1967). The benefit of every reasonable inference available from the evidence must also be extended to that party. A verdict may not be directed unless the evidence points all one way and is susceptible of no reasonable interferences which would sustain the position of the motion's opponent. *Christopherson v. Humphrey*, 366 F.2d 323 (10th Cir. 1966), *Hardware Mutual Insurance Co. v. Lukken*, 372 F.2d 8 (10th Cir. 1967); *Commercial Standard Insurance Co. v. Feaster*, 259 F.2d 210 (10th Cir. 1958).

Minimum interference with the jury must serve as the judiciary's primary goal. *Wilkin v. Sunbeam Corporation*,

supra. Removal of a fact question from the jury should occur only in the most clear and compelling instances where complete failure of proof exists. Here, the damage testimony was clear, convincing, forthright and uncontroverted. The case did not compel a directed verdict.

Question 3. The Court of Appeals' affirmance of the District Court and denial of rehearing were clearly erroneous and sanctioned an unauthorized and blatant departure from the accepted and usual course of judicial proceedings. A directed verdict is appropriate only when evidence is all one way or is so overwhelming preponderant in favor of the movant that the trial court, would, in the exercise of its sound discretion, be so required to set aside an opposite verdict. *Chicago, R. I. and P. Ry. Co. v. Howell*, 401 F.2d 752 (10th Cir. 1968); *Texaco, Inc. v. Pruitt*, 396 F.2d 237 (10th Cir. 1968); *Barnett v. Life Ins. Co. of the Southwest*, 562 F.2d 15 (10th Cir. 1977).

Had the issue of damages gone to the jury, the District Court would not have been required to set aside a verdict for Petitioners. Hence, directing verdict for Respondent was not only improper, but a wholly unauthorized exercise of judicial discretion, which action should be rectified by this Court.

CONCLUSION

The right to trial by jury is a fundamental legal right which should be jealously guarded by this Court. Petitioners ask for nothing more than a submission of their case on the facts to a jury. They are entitled to such a procedure.

It is not for the District Court, or an appellate court, to act as trier of fact in a proper jury case. This is such a case and this court should take jurisdiction, reverse and remand for submission to a District Court jury.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KENT F. FRATES
Counsel for Petitioners
Suite 1250, 101 Park Avenue Bldg.
Oklahoma City, Okla 73102
Telephone: (405) 272-0616

KENT F. FRATES
Counsel of Record
June, 1980

CERTIFICATE OF SERVICE

I, Kent F. Frates, attorney for Molly Murphy's Inc. and Molly Murphy's Club, Inc., Petitioners, hereby certify that on the _____ day of June, 1980, I served a copy of the foregoing Petition for a Writ of Certiorari on Ronald N. Masters, the Respondent herein, by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Joe S. Rolston III, attorney of record for the Respondent, at Suite 200, Local Federal Building, Oklahoma City, Oklahoma 73102.

_____
KENT F. FRATES

APPENDIX

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 78-1602

RONALD N. MASTERS, Plaintiff - Appellee, v. MOLLY MURPHY'S, INC. and MOLLY MURPHY'S CLUB, INC., Defendant - Appellants.	On Appeal From The United States District Court For The Western District Of Oklahoma (D.C. No. CIV-77-0730-E)

Kent F. Frates of Ellis & Frates, Oklahoma City, Oklahoma (George S. Saunders of Saunders & Byrd, Oklahoma City, Oklahoma, on the brief), for Appellants.

Joe S. Rolston, III (Steven P. Metheny with him on the brief) of Elliott, Woodard, Rolston, Kelley, & Metheny, Oklahoma City, Oklahoma, for Appellee.

Before SETH, Chief Judge, LOGAN and SEYMOUR, Circuit Judges.

SETH, Chief Judge.

MARCH TERM - April 29,1980

Before the Honorable Oliver Seth, Chief Judge, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

Jim Scott, an officer and owner of Scott Investment Company (Scott), and Robert Tayar, who was the president and principal owner of the two defendant corporations referred to as Molly Murphy's, had agreed that Scott would build a restaurant building on its land in Oklahoma City and lease it to Molly Murphy's. The two men liked the design of a restaurant and building in San Antonio, and they sought out the person who had planned and designed the restaurant with the view to securing his services. They went to Arizona to see this person who is the plaintiff. A tentative verbal agreement as to services and pay was reached. It was agreed that plaintiff would provide all necessary design and planning services and would be paid $30,000.00 in cash and receive also one percent of the gross revenue of the restaurant.This was later divided into two agreements, one with Scott to pay the cash amount to go into the cost of the building, the other for the percentage to be paid by Molly Murphy's from time to time as it became due. The agreements were reduced to writing and executed separately.

The cash fee was paid by Scott, but the percentage fee was not paid and plaintiff brought this action. The trial court directed a verdict for the plaintiff on the fee at the conclusion of the presentation of evidence to the jury. The court also directed verdicts against a counterclaim and also against a second cause of action asserted by the plaintiff.

The plaintiff was not an architect, and the dispute centers about this fact. Mr. Scott testified that he had checked into plaintiff's qualifications before he and Mr. Tayar met him in Arizona and determined that he was not an architect. He testified also that he had told Mr. Tayar that plaintiff was not listed as a qualified architect in Arizona or Oklahoma. Mr. Tayar and his wife, who was also in Arizona, testified that they did not know plaintiff was not an architect. The defendants as a defense asserted that the agreement for a fee was invalid under Oklahoma statutes regulating architects

and architectural services. The other main defense was of fraud based on asserted representations by plaintiff that he was an architect.

The basis for the trial judge's conclusion to direct a verdict was included in his explanation to the jury when the verdict was so directed. In substance it was that under 59 Okla. Stat. Ann §45.3a a person who was not qualified as an architect was excepted from the act providing for licensing of architects, and could provide architectural services for the construction of a building of the type here concerned. Also, there was no prohibition under the statute against the selling of such services. This exception to the general act was for commercial buildings not exceeding two stories. 59 Okla. Stat. Ann. § 45.3(2). It is undisputed that this building was within the described category.

We must agree with the trial court that the Oklahoma statutes expressly provide that for a building of the type here concerned architectural services could be contracted for and provided by a person who was not an architect. Thus as to the services here performed by plaintiff and sued upon, the fact that he was not an architect was in no way contrary to Oklahoma law, and the agreements for the fee were expressly permitted. The statute is perfectly clear as to this exception, and no construction or interpretation is needed.

The record shows that the building was completed, and the restaurant opened for more than a year before this suit was filed. There were no objections or complaints by defendants as to the design, the finish, the structural elements, nor as to any services performed by the plaintiff or his associates. The record shows that the associates of plaintiff who were engineers or architects did the structural, mechanical design, the drawings, and apparently everything except the basic design. Attorneys for plaintiff wrote twice to defendants about the percentage fee, but received no answer, and suit was thereafter filed.

The defendants in their answer to the complaint filed September 1, 1977 also set up the defense of fraud and sought rescission. This fraud defense is also directed to the fact that the plaintiff was not an architect. The allegation was that defendants did not know of this when they negotiated with him in Arizona nor when the contract for services was signed. The defendants assert in addition that the plaintiff

represented himself to be an architect, and so held out to be so licensed.

If it be assumed that Mr. Tayar and thus Molly Murphy's were deceived by the plaintiff and false representations were made as to whether plaintiff was an architect, it nevertheless does not appear that a defense of fraud was established under the case law of Oklahoma. This is also the conclusion reached by the trial court as there was no injury shown. The pretrial order states in substance that defendants relied on the representations of plaintiff that he was an architect "to their detriment." There was, however, no proof directed to this matter. The defendants assert on appeal that the building cost more than was expected or estimated, but this does not appear to be a problem in any way unusual or peculiar to this building.

Mr. Tayar testified after questions directed to sales tax reports described in the agreement and to be furnished by Molly Murphy's:

> THE COURT: Counsel, I don't know the purpose of all this cross examination. As I understand it, and you correct me if I'm wrong, but you say it's invalid because he held himself out to be an architect and he wasn't?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: That's the reason why you say that Contract is no longer binding?
>
> THE COURT: That's the only reason, as I understand it.
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Because he was not an Architect when he said he was.

Thus the objection or reason was not directed to any problem relating to the building or the services. It was in an abstract way complaining of the fact plaintiff was not an architect with no reference to any consequences flowing therefrom. It is thus apparent that no element of injury as a consequence of the fraud alleged was in any way established.

The parties have argued the Oklahoma case law describing the elements of fraud. These opinions have developed the

requirements on several occasions and very clearly. These cases include *D & H Co., Inc. v. Shultz*, 579 P.2d 821 (Okla); *Bridges v. Bridges*, 544 P.2d 493 (Okla.); *Steiger v. Commerce Acceptance of Okla. City, Inc.*, 455 P.2d 81 (Okla.); and *Ramsey v. Fowler*, 308 P.2d 654 (Okla.). In these opinions it is apparent that **each** of the six or seven elements of fraud must be present. The cases include among the elements the requirements that the one against whom the fraud is practiced must suffer "injury" as a consequence of the act for the fraud to be actionable.

In *D & H Co., Inc. v. Shultz*, 579 P.2d 821 (Okla.), where defendant's fraud was asserted and the issue was whether defendant knew the statement to be false, the court listed the "elements of actionable fraud." These included a requirement "that plaintiff acted in reliance upon it and thereby suffered injury," citing State ex. rel. *Southwestern Bell Tel. Co. v. Brown*, 519 P.2d 491 (Okla.). The court in *Bridges v. Bridges*, 544 P.2d 493 (Okla.), a suit to set aside a property settlement, said in part:

> In order to secure relief on the basis of fraud, the person seeking redress must have been damaged. Fraud, without injury, is not actionable at law or in equity (citing cases).

And in *Ramsey v. Fowler*, 308 P.2d 654 (Okla.), in the syllabus the court's listing of elements includes "thereby suffered injury." These opinions refer to any circumstance where relief is sought on the basis of fraud.

In addition to the architect issue, the appellants urge strongly that there were two independent contracts with plaintiff for the same services, and the one with the defendant corporations cannot be enforced for that reason, or in any event, plaintiff has been paid in full by the cash payment. The record is clear as to why, from the original single agreement, two developed. It was basically because defendants wanted the cash amount to be paid by Scott, and added to the cost of the building. It was thus a division of the obligation between the entities for whom the services were performed for their convenience. There is nothing to indicate that the obligation as to the one percent payment was in any way discharged as defendants urge.

The appellants place great emphasis on the remarks made by the trial judge at the time he advised the jury that the

verdict would be directed. The judge also made some remarks after the jury was released . The record demonstrates that the trial judge was correct on the law and on his measure of the proof which had been advanced. The directed verdict was proper under the circumstances. *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fab.*,584 F.2d 946 (10th Cir.); *Yazzie v. Sullivent*, 561 F.2d 183 (10th Cir.). On this appeal the additional remarks by the trial judge do not serve to change in any way the consequenses of his course of action nor to cast doubt on the conclusion he reached.

We also find no error in the disposition by the trial court of the plaintiff's cause of action nor of defendants' counterclaim.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Ronald N. Masters,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CIV-77-0730-E
	)	
Molly Murphy's, Inc. and	)	
Molly Murhpy's Club, Inc.,	)	
	)	
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

BE IT REMEMBERED on this 22nd day of May, 1978, the above styled and numbered cause comes on for hearing having been regularly set for jury trial on this date, and the plaintiff appearing in person and by his attorneys, Elliott, Woodard, Rolston & Kelley, and the defendant corporations, Molly Murphy's, Inc. and Molly Murphy's Club, Inc., appearing by their attorneys, Saunders & Byrd.

Thereupon, a jury was impaneled and sworn in, and the plaintiff announced ready for trial and the defendants announced ready for trial

Thereupon, the plaintiff presented his testimony and introduced evidence in support of his causes of action and rested; and, thereupon, the defendants presented their testimony and introduced their evidence in support of their defenses to plaintiff's causes of action and rested; and, thereupon, defendant Molly Murphy's Inc., introduced their evidence, in camera, in support of its counterclaim, and rested.

Thereafter, the plaintiff moved the Court for a directed verdict in his favor with respect to his first cause of action; that, thereafter, the defendants moved the Court for a directed verdict in their favor with respect to plaintiff's second cause of action; and that, thereafter, plaintiff moved the Court for a directed verdict in his favor with respect to the defendant, Molly Murphy's, Inc., couterclaim.

The Court, having heard the testimony and evidence presented and the arguments of counsel finds that the plaintiff's motion for a directed verdict in his favor and against each of the defendants, with respect to plaintiff's first cause of action for breach of contract, should be sustained with exceptions to said defendants.

The Court further finds that the defendants' motion for a directed verdict in their favor and against the plaintiff, with respect to plaintiff's second cause of action of wrongful use of plans and specifications, should be sustained with exceptions to said plaintiff.

The Court further finds that the plaintiff's motion for a directed verdict in his favor and against the defendant, Molly Murphy's Inc., with respect to said defendant's counterclaim, should be sustained with exceptions to said defendant.

Thereupon, the Court instructed and directed the jury to enter its verdict accordingly, and pursuant to said instruction the following verdict was entered:

"We, the Jury, find in favor of the plaintiff, Ronald N. Masters, and against the defendants, Molly Murphy's, Inc. and Molly Murphy's Club, Inc., and fix the amount of his recovery at $37,988.16. We further find against the plaintiff and in favor of the defendants on the issue of the defendants' use of plans and specifications or permitting their use in connections with the Molly Murphy of Tulsa. We further find in favor of the plaintiff and against the defendants on the cross-claim relating to judgement entered in *Ford Audio and Acoustics, Inc. v. Molly Murphy's, Inc.*, Case No. CJ-76-1448.

All the foregoing is done at the direction of the Court." .....Floyd E. Shultz, Foreman, May 24, 1978.

That, additionally, pursuant to the above said verdict of the jury, the Court found that the defendants should pay to plaintiff interest on the amount of said judgment as the law may allow, costs of said action and a reasonable attorney's fee in the sum of $10,000.00. That, finally, the Court found that the defendants should comply with the terms of their written agreement with plaintiff, dated March 11, 1975, with respect to future payments which might be due plaintiff thereunder, the monthly depositing of monies to pay same, if necessary, and the furnishing of Oklahoma sales tax monthly reports, if so requested, under penalty of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff, Ronald N. Masters, have and recover judgment against the defendants, Molly Murphy's Inc. and Molly Murphy's Club, Inc., on plaintiff's abovesaid first cause of action in the sum of $37.988.16 together with interest thereon as the law may allow until the 24th day of May, 1978, and thereafter ate the rate of ten percent (10%) per annum until paid, costs of said action, and a reasonable attorneys' fee of $10,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants have judgment against the plaintiff on plaintiff's abovesaid second cause of action; and that plaintiff have and recover judgment against defendant, Molly Murphy's, Inc., on said defendant's counterclaim.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants be and are hereby ordered to comply with the terms of their written agreement with plaintiff, dated March 11, 1975, with respect to future payments which might be due plaintiff thereunder, the monthly depositing of monies to pay same, if necessary, and the furnishing of Oklahoma sales tax monthly reports, if so requested, under penalty of law.

IT IS FURTHER ORDERED that the plaintiff and the defendants, and each of them, are allowed exceptions to adverse rulings of the same Court.

/S/_____
LUTHER B. EUBANKS
UNITED STATES DISTRICT JUDGE

APPROVED BY :

ELLIOTT, WOODARD, ROLSTON & KELLEY

BY /S/_____
STEVEN P. METHENY
ATTORNEYS FOR PLAINTIFF,
RONALD N. MASTERS

SAUNDERS & BYRD

BY /S/_____
GEORGE F. SAUNDERS
ATTORNEYS FOR DEFENDANTS,
MOLLY MURPHY'S, INC. AND
MOLLY MURPHY'S CLUB, INC.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RONALD N. MASTERS,	)	
	)	
Plaintiff - Appellee,	)	
	)	
vs.	)	No. 78-1602
	)	
MOLLY MURPHY'S, INC., and MOLLY MURPHY'S CLUB, INC.,	)	
	)	
Defendants - Appellants	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

/S/
HOWARD K. PHILLIPS, Clerk

Supreme Court, U.
FILED
JUL 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1973

In the Supreme Court of the United States

OCTOBER TERM, 1979

MOLLY MURPHY'S, INC. and
MOLLY MURPHY'S CLUB, INC.,
Petitioners,

VERSUS

RONALD N. MASTERS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOE S. ROLSTON, III, of
ELLIOTT, WOODARD, ROLSTON,
KELLEY & METHENY
Suite 300, Local Federal Building
203 Park Avenue
Oklahoma City, Oklahoma 73102
Telephone (405) 235-5315

Counsel for Respondent

July, 1980

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED	3
STATEMENT OF CASE	4
REASONS WHY THE WRIT SHOULD BE DENIED	6
ARGUMENT	7
CONCLUSION	9

CERTIFICATE OF SERVICE follows Brief.

TABLE OF AUTHORITIES

Cases

Black, Silvals and Bryson, Inc. v. Keystone Steel Fab., 584 F.2d 946 (10th Cir. 1978)	7
Bridges v. Bridges, 544 P.2d 493 (Okla. 1975)	7
Ramsey v. Fowler, 308 P.2d 654 (Okla. 1957)	7
Steiger v. Commerce Acceptance of Oklahoma City, Inc., 455 P.2d 81 (Okla. 1969)	7
Yazzie v. Sullivent, 561 F.2d 183 (10th Cir. 1977)	7

Statutes

15 O.S. (1971) § 233	3

Rules

U. S. Sup. Ct. Rule 19.1(b) (28 U.S.C.A.)	3, 9
U. S. Sup. Ct. Rule 56 (28 U.S.C.)	8

No. 79-1973

In the Supreme Court of the United States

OCTOBER TERM, 1979

MOLLY MURPHY'S, INC. and
MOLLY MURPHY'S CLUB, INC.,
Petitioners,

VERSUS

RONALD N. MASTERS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent is satisfied with the presentation by Petitioners as to opinions below and jurisdiction and, therefore, declines to comment thereon.

QUESTIONS PRESENTED

Although Respondent generally agrees that the statements, contained in Petitioners' Petition for Writ of Certiorari under questions presented, fairly represent the nature of the litigation and its outcome in the District Court and Court of Appeals, Respondent is dissatisfied with the presentation of the questions presented.

The issues presented by the Petitioners and Respondent in their respective Briefs to the Court of Appeals were confined solely to two issues, the first of which dealt with whether the trial court erred in directing a verdict for

Respondent Masters and entering judgment accordingly, and the second with the trial court's action in dismissing and directing a verdict in favor of Respondent Masters on Petitioners' counterclaim, which issue is not pertinent to this Petition.

Respondent respectfully submits that Question 1 posed by Petitioners was not clearly advanced to the Court of Appeals in the parties' briefs in chief, but was first raised in the Petition for Rehearing of Petitioners. Further, that Question 2 posed by Petitioners manifests Petitioners were denied their right to trial by jury, which was not the case. To the contrary, all evidence and testimony was presented to a jury and, upon both parties resting, the District Court directed a verdict in favor of Respondent as a result of Petitioners' evidence failing to support all of the essential elements necessary to prove fraud under the well-established law of the State of Oklahoma. Likewise, Respondent believes that Question 3 as proposed by Petitioners is not fairly stated, since the Court of Appeals, in affirming the District Court and denying rehearing, followed the Statutes and well-established case law of the State of Oklahoma, and did not depart from the accepted and usual course of judicial proceedings.

In Respondents' judgment, the only issue which could be presented by this Petition, fairly stated, is: Whether the Court of Appeals' affirmance of the District Court's action in directing a verdict in favor of Respondent, based on a finding that the evidence of Petitioners failed to establish all essential elements to prove fraud under the laws of the State of Oklahoma, has so far departed from the accepted and usual course of judicial proceedings, or

so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision pursuant to U.S. Sup. Ct. Rule 19.1(b), 28 U.S.C.A.

STATUTES, FEDERAL RULES AND REGULATION INVOLVED

Respondent is dissatisfied with Petitioners' presentation of Statutes, Federal Rules and Regulations involved in this Petition, since the Statutes set forth in the Petition were not relied upon in the Briefs in Chief of the parties presented to the Court of Appeals, but were first raised by Petitioners in their Petition for Rehearing.

This Petition involves no Federal Statutes, Rules or Regulations, but is confined solely to the well-established Statutes and case law of the State of Oklahoma relating to the essential elements necessary in order to prove actionable fraud, as it relates to rescission of a contract under the terms of 15 O.S. (1971) § 233, which provides in part:

> "A party to a contract may rescind the same in the following cases only: (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

STATEMENT OF CASE

Petitioners' only defense pertinent to this Petition to Respondent's action to enforce the written contract between the parties relating to payment for services rendered was based on allegations of fraud in the inducement, which allegations were specifically denied by Respondent. Under the undisputed law of Oklahoma, as cited in both Petitioners' and Respondent's Briefs in Chief to the Court of Appeals, to constitute actionable fraud, it must be made to appear: (1) That a material representation was made; (2) that it was false; (3) that the party making the representation knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; (6) that such party thereby suffered injury, and (7) that all of the elements must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any of them being fatal to recovery.

Both the District Court, after hearing all of the testimony and evidence, and the Appeals Court, after reviewing the transcript of the trial, and having benefit of oral argument, both found that Petitioners' evidence, with logical inferences to be drawn therefrom, was wholly insufficient to establish all elements necessary to prove fraud and, thus, support a jury verdict in favor of Petitioners. Accordingly, the trial court properly sustained the Respondent's Motion for Directed Verdict.

Although the excerpts from the testimony of Petitioners' witness, Robert L. Tayar, set forth in Petitioners' Statement of Case, does appear in the trial transcript where indicated, it was presented, in the opinion of Respondent and, we believe, the opinion of the trial court and Court of Appeals, not for the purpose of establishing damages, as Petitioners assert, but merely to reflect upon Respondent's qualifications and as to whether he, in fact, had held himself out to be an architect.

The trial court and Court of Appeals each placed great. emphasis on the following testimony by Petitioners' same witness, Robert L. Tayar:

> "THE COURT: Counsel, I don't know the purpose of all this cross examination. As I understand it, and you correct me if I am wrong, but you say it's invalid because he held himself out to be an architect and he wasn't?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: That's the reason you say the contract is no longer binding?
>
> THE WITNESS: That's right.
>
> THE COURT: That's the only reason, as I understand it.
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Because he was not an architect when he said he was." (Trial Transcript p. 263, lines 10 to 22.)

Under the uncontested Oklahoma law, a person is not required to be an architect to perform the services undertaken by Respondent in the written contract sued upon.

Respondent's position is clearly supported by the following comments made by the trial Judge in directing the verdict in favor of Respondent:

> "Now, if there had been something wrong with the plans, if the roof would have leaked or caved in during the snow, or something like that, we would have a different matter, or maybe void the contract, or other things could have arisen which, apparently, did not, that may have entitled the defendant to void this contract, but they seek to recover, and I asked Mr. Tayar specifically for the bases, and he said, 'Well, the only reason we want to void the contract is because he wasn't an architect'. True, there is evidence that it cost—the building cost more, the interior decoration cost more than was estimated, that is not asserted either in the pleadings or the testimony as any grounds for rescinding the agreement. Therefore, I hold as a matter of law that the agreement must be enforced." (Trial Transcript p. 275, Lines 9 to 23.)

REASONS WHY THE WRIT SHOULD BE DENIED

The Petitioners' writ should be denied, since the Petition wholly fails to show there are any special and important reasons for the granting thereof, within U. S. Sup. Ct. Rule 19, 28 U.S.C., or otherwise.

ARGUMENT

QUESTION NO. 1

The Petitioners' testimony and evidence offered during the trial of the issues to the District Court failed to prove all essential elements necessary to establish actionable fraud under the undisputed law of the State of Oklahoma, and the absence of any one element is fatal to recovery. *Ramsey* v. *Fowler,* 308 P.2d 654 (Okla. 1957). *Steiger* v. *Commerce Acceptance of Oklahoma City, Inc.,* 455 P.2d 81 (Okla. 1969); *Bridges* v. *Bridges,* 544 P.2d 493 (Okla. 1975).

Since the petitioners failed to offer evidence which, with logical inferences to be drawn therefrom, was sufficient to support a verdict for the petitioners, there was nothing to submit to the jury, and the District Court properly sustained a Motion for Directed Verdict in favor of Respondent. *Stieger* v. *Commerce Acceptance of Oklahoma City, Inc., supra.*

QUESTION NO. 2

In the absence of testimony or evidence supporting all or any one of the essential elements of fraud, as required to be established under the Oklahoma law, Petitioners had no right for submission of the case to a jury on such issue, and a directed verdict by the trial court was proper under the circumstances. *Yazzie* v. *Sullivent,* 561 F.2d 183 (10th Cir. 1977); *Black, Silvals and Bryson, Inc.* v. *Keystone Steel Fab.,* 584 F.2d 946 (10th Cir. 1978).

QUESTION NO. 3

The Petitioners present no authorities to support the proposition that the decision of the trial court and of the Court of Appeals affirming the same and denying rehearing were clearly erroneous and, in any manner, sanctioned an unauthorized and blatant departure from the accepted and unusual course of judicial proceedings. To the contrary, the record clearly reflects both the trial court and the Court of Appeals steadfastly applied the clearly established laws of the State of Oklahoma in the accepted and usual course of these judicial proceedings, and sanctioned no departure therefrom which would call for this Honorable Court to exercise its powers of supervision by granting Petitioners' writ.

Respondent further respectfully submits this Petition appears to be frivolous and filed merely for purposes of delaying Respondent from recovering monies lawfully due him under the judgment of the District Court; that Petitioners, in order to supersede execution on the judgment of the District Court, have assigned to the District Court Clerk Certificates of Deposit, some of which are earning interest in excess of the interest accruing on Respondent's judgment herein, thus resulting in additional pecuniary gain to Petitioners, to the detriment of Respondent. That, under U.S. Sup. Ct. Rule 56, 28 U.S.C., there appearing to be no grounds for the granting of this Petition, Respondent should recover reasonable damages for his delay.

CONCLUSION

Petitioners have been denied no fundamenntal legal right, either under State or Federal law, nor have they presented any special or important reasons under U.S. Sup. Ct. Rule 19, 28 U.S.C., or otherwise, to require this Court to exercise its power of supervision and grant this Petition for a Writ of Certiorari.

Respectfully submitted,

JOE S. ROLSTON, III, of
ELLIOTT, WOODARD, ROLSTON, KELLEY & METHENY
Suite 300, Local Federal Building
203 Park Avenue
Oklahoma City, Oklahoma 73102
Telephone (405) 235-5315

Counsel for Respondent

July, 1980

CERTIFICATE OF SERVICE

I, Joe S. Rolston III, attorney for Ronald M. Masters, Respondent, hereby certify that on the ____ day of July, 1980, I served a copy of the foregoing Brief of the Respondent in Opposition to Petition for Writ of Certiorari on Molly Murphy's, Inc. and Molly Murphy's Club, Inc., the Petitioners herein, by mailing three copies in a duly addressed envelope, with first class postage prepaid thereon, to: Kent F. Frates, Attorney of Record for Petitioners, at Suite 1250, 101 Park Avenue Building, Oklahoma City, Oklahoma 73102, and to William B. Rogers, Co-Counsel for Petitioners, at 219 Couch Drive, Oklahoma City, Oklahoma 73102.

JOE S. ROLSTON III